

## Special permit to enlarge waterfront house annulled

Land Court ruling: project would harm neighborhood

By Eric T. Berkman  
Lawyers Weekly Correspondent

The Nantucket Planning Board abused its discretion when it issued a special permit for an owner/developer to convert a one-story residential cottage into a larger commercial rental property with public access to a deck over the water, a Land Court judge has ruled.

Specifically, the developer planned to add a second story and increase the cottage's ground-level footprint by one-third. The developer also planned to construct a new deck and platform over Nantucket Harbor that would be open to the public at all hours as required by Chapter 91, the Massachusetts Public Waterfront Act.

A passageway sitting just over a foot from the abutting neighbor's house would provide sole access to the deck.

The plaintiff abutter argued that no reasonable planning board could have found that the proposed structure would not be substantially more detrimental to the neighborhood — which currently provides no public access to the waterfront — than the existing structure.

Judge Keith C. Long agreed.

"So far as the record shows, the public's rights and times of access [to the deck] are unrestricted. In such close quarters and, unlike the case with private neighbors whom you come to know, no way of knowing who is there for innocent purposes and who not, the security risks and likelihood of incidents ... are increased," Long wrote in reversing the board's decision. "No rational board would conclude that such expansive public access would not be substantially more detrimental to the neighborhood than the existing, wholly-private cottage and lot."



The dispute involved a one-story cottage on Nantucket Harbor.

The 22-page decision is *Corey v. Rector, et al.*, Lawyers Weekly No. 14-053-16. The full text of the ruling can be ordered at [maslawyersweekly.com](http://maslawyersweekly.com).

### 'Broad but limited discretion'

Donald R. Pinto Jr. of Boston, who represented the abutter, said the case shows that while permit-granting authorities have broad discretion to issue special permits, their power is not unlimited.

"They do have a lot of leeway, so most cases challenging the issuance of a special permit end up with it being affirmed," Pinto said. "But if you have a case with the right set of facts, you can get a court to rule that no rational board could have [decided] a proposed project wasn't substantially more detrimental to the neighborhood."

The project at issue in *Corey* essentially involved a new public park with a wooden deck, benches, grassy areas, and a connected second deck on a small, private residential lot.

"If you wanted to expand substantially as this owner did, and replace a deck that had previously washed away in a storm, under Chapter 91 you had to provide for public access, which turned out to be a key basis for the judge's finding," Pinto said.

The developer's lawyer, Steven J. Brake of Boston, said his client plans to appeal the decision.

"The evidence showed that the entire wharf consists of similar rental properties with one or two commercial properties and just two residential ones — the abutters on each side," Brake said. "So we don't see [the project] as changing the neighborhood. Obviously, the judge thought otherwise, but we felt like we had substantial evidence."

Daniel P. Dain, a real estate litigator in Boston, said the decision is very worrisome to developers on multiple fronts.

First, Dain said, the judge found that the abutter had standing to challenge the permit based on noise that construction at the site was expected to generate.

"This seems to be a major expansion of the realm of those with standing," he said. "Every development project produces significant noise. If that is enough to confer standing, it is hard to see how any abutter would ever *not* have standing."

Dain also pointed to dicta in a footnote suggesting that a single-family rental property would not count as residential for zoning purposes. That could have broader consequences, Dain said, considering how

many single-family homes in vacation areas like Nantucket are listed as rentals for much of the year.

Meanwhile, he noted that while the court is supposed to consider the impact to be felt by the neighborhood as a whole, the judge apparently heard impact testimony only from the abutter challenging the permit.

And while the judge viewed the new public access point to the water as a negative, Dain said he did not see why it would necessarily be irrational for the board to view it as a positive for the neighborhood as a whole, even if unwelcome from the immediate abutter's standpoint.

"The reason that the standard of review is so deferential is that a local board is in a better position than a court to weigh the benefits and costs to the neighborhood that the board represents," Dain said. "It is surprising that the court here substituted its judgment for the board's."

However, Carl C. Goodman, a Lynn lawyer who handles land-use disputes, described the ruling as "inescapable." After all, he said, the parcel was nonconforming to begin with, and now the owner wanted to take something that could not be built today and dramatically increase its size and change its use.

"There are significant limitations imposed by both Chapter 40A and local zoning bylaws on these kinds of expansions," he said. "Besides, it's not as if you have someone renting out their home from time to time. This would be a full-time rental property with a stream of different people, along with public access — in very close proximity to abutters — that would be wholly unregulated."

#### Public access

Defendant 23 Commercial Wharf J.A., LLC, owned by Boston resident James Apteker, purchased a one-story residential cottage at 23 Commercial Wharf on Nantucket. The 359-square-foot structure was located on the south side of Commercial Wharf, a quiet strip of waterfront residences on Nantucket Harbor.

Apteker, who owns and manages a number of resorts and event spaces in New England, initially thought he might



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use the property as a vacation home but ultimately opted to renovate and expand it for commercial rental purposes.

23 Commercial developed a plan to add a second story and increase the footprint to 586 square feet. The cottage would be lifted and moved seven feet north and 3.8 feet east to eliminate current side and rear setback nonconformities from which the property had been grandfathered.

The developer further planned to expand the deck overlooking the harbor while adding a platform directly over the water to replace one that had been destroyed in a storm.

Chapter 91's licensing rules required that the new deck and platform be accessible to the public at all times. Accordingly, the developer proposed to use a five-foot-wide open space along the west end of the lot, created once the house was moved, as a public passageway to the deck.

To address concerns about noise and disturbances on the new public deck, the developer presented a "management plan" under which a hotel elsewhere on the island would manage cleaning, maintenance and the check-in/check-out process while prohibiting pets, smoking, offsite guest parking, and loud noise between 10 p.m. and 7 a.m.

It apparently was unclear, however, how noise, smoking and pet prohibitions would be enforced with respect to the general public, which now would have around-the-clock access.

An abutter, plaintiff Richard Corey, objected to the project, pointing out that the public passageway to the deck was only 1.2 feet from the edge of his house and directly underneath a bedroom window.

The Nantucket Planning Board granted the permit. Corey appealed the ruling to

Land Court, where Long held a week-long jury-waived trial in 2015 before releasing a decision in late July.

#### Irrational decision

Long found the board's decision indeed constituted an abuse of discretion.

"The Board's approach does not comply with the law applicable to the expansion and conversion of non-conforming properties, particularly to this extent, in this way (conditioned on public access where none existed before), and on a lot this undersized with a building so close to its neighbors," he said. "The relevant inquiry is whether the expansion and conversion will be 'substantially more detrimental to the neighborhood' than the existing residential cottage. This it surely will."

In so finding, Long emphasized that the relevant test was not whether the public would benefit from new public areas on the water for year-round viewing, picnicking or fishing, but the extent to which the project would impact the entirely private character of the neighborhood.

In this case, the deck and platform would be a short walk from the center of Nantucket, providing an "extraordinary" view that would become popular for gatherings at all hours as its location and availability became increasingly well known, the judge said.

"What had been quiet and private before ... will no longer be so," he said.

Long found that there was no concrete management plan in place that would actually address those impacts. Besides, the judge said, any such plan would govern behavior of guests paying to stay in the cottage but would have little, if any, effect on the public's use of the area.

Accordingly, the judge concluded, the board's decision should be reversed. **MLW**

